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VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Protecting and Promoting the Open Internet,* GN Docket No. 14-28;
***Framework for Broadband Internet Service,* GN Docket No. 10-127**

Dear Ms. Dortch:

Almost ten years into the Commission's efforts to develop effective, equitable, and sustainable standards to protect and promote Internet openness, the agency once again finds itself at a crossroads. On the one hand, the Commission could follow the clear path laid out by the D.C. Circuit in *Verizon v. FCC* and adopt new rules under Section 706 of the Telecommunications Act of 1996.[1] This path—which finds broad support from a wide array of parties, including Internet service providers ("ISPs"), technology companies, social advocacy groups, and economists—would enable the Commission to adopt robust restrictions on blocking, paid prioritization, and other harmful conduct in a manner that would be legally defensible and would ensure continued investment and innovation in broadband.[2] But while the Commission proposed to follow this path in the Notice of Proposed Rulemaking ("NPRM") issued in May,[3]

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1 *See Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), *affirming in part, vacating and remanding in part*, *Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 25 FCC Rcd 7905 (2010) ("*2010 Open Internet Order*").

2 *See* Comments of the National Cable & Telecommunications Association, GN Docket Nos. 14-28, 10-127, at 6-16 (filed Jul. 15, 2014) ("NCTA Comments"); Reply Comments of the National Cable & Telecommunications Association, GN Docket Nos. 14-28, 10-127, at 24-30 (filed Sep. 15, 2014) ("NCTA Reply Comments").

3 *See Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 ¶ 142 (2014) ("NPRM").

the recent debate has taken a concerning turn, as the Commission now appears to be contemplating the far more risky and destabilizing alternative of reclassifying broadband as a Title II "telecommunications service," and subjecting the dynamic and evolving Internet ecosystem to stifling common-carrier regulation.

As the National Cable & Telecommunications Association ("NCTA") has explained in prior submissions—and as discussed further below—seeking to reclassify broadband Internet access (or any component thereof) under Title II would be a profound mistake. Such a move would threaten to destroy the Internet's dynamism and reduce broadband investment and innovation; would stand a significant chance of being reversed on appeal; and would be entirely unnecessary in light of the Commission's broad and judicially confirmed authority under Section 706. The Commission has recognized these serious legal and policy problems with Title II reclassification in the past, and the record in this proceeding powerfully reinforces these concerns.

If the Commission ultimately decides to pursue a Title II-based approach, however, it is clear that, at a bare minimum, any reclassification decision should be coupled with immediate, nationwide forbearance from *all* of Title II's obligations and restrictions. The *Verizon* court affirmed the Commission's authority to adopt strong open Internet protections—including prohibitions on blocking, unreasonable discrimination, and paid prioritization—under Section 706 *alone*; it struck those measures down only because the rules, as framed in the *2010 Open Internet Order*, appeared to impose impermissible common carriage mandates on providers of an information service.[4] The asserted goal of reclassification is to eliminate the common-carrier prohibition and to enable the Commission to reinstate the same rules it adopted in 2010 while otherwise retaining the light-touch framework that has helped fuel the burgeoning and wildly successful Internet ecosystem, and the *Verizon* decision makes clear that the Commission can accomplish that goal without relying on *any* of Title II's substantive obligations or restrictions. For this reason, as explained below, virtually all stakeholders and policymakers recognize that reclassification and broad forbearance must go hand-in-hand. Even the most fervent proponents of a Title II-based approach in this proceeding have argued at length that streamlined forbearance proceedings would be appropriate if the Commission were to pursue reclassification. And granting broad forbearance in such a manner would be consistent with Commission precedent, justified by record evidence, and entirely proper given the existence of Section 706 as backstop authority for any additional rules needed to protect competition and consumers in the broadband marketplace.

Finally, whatever path the Commission chooses as a legal basis for adopting new open Internet rules, it must ensure that the scope and content of those rules are appropriately tailored to the policy interests at stake. Below we identify and briefly address three topics—the treatment of Internet traffic-exchange arrangements, specialized services, and Wi-Fi—that continue to warrant close attention as the Commission moves toward a final order.

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4 *See Verizon*, 740 F.3d at 635, 657.

I. RECLASSIFICATION OF BROADBAND INTERNET ACCESS SERVICE UNDER TITLE II WOULD BE UNWISE, COUNTERFACTUAL, AND LIKELY UNLAWFUL

A. Imposing Title II Regulation on Broadband Internet Access Would Be Counterproductive as a Policy Matter

Broadband Internet networks fuel America's economic growth, facilitate civic participation, and enable a dizzying array of communication, entertainment, and educational options. In short, the Internet has become a crucial part of daily life. But this outcome was not preordained. Instead, the Internet's growth has been nurtured and guided by the Commission's long-established "light-touch" regulatory regime. Under both Democratic and Republican administrations, the Commission has repeatedly rejected calls to regulate broadband Internet access service under Title II. And broadband providers have responded as the Commission had hoped (and encouraged), investing an astounding $1.2 trillion in private capital since 1996 to develop and deploy ever-improving advanced broadband networks.[5] As a result, these networks have unleashed the creativity and entrepreneurial spirit of Americans who have made the Internet what it is today. Reversing course now would be ill-advised and is not supported by the record.

As NCTA and others have explained, imposing a Title II regime would inject unnecessary uncertainty and overbearing regulation into a key sector of the U.S. economy, threatening to disrupt the market incentives that have fueled decades of unprecedented growth.[6] One need only compare the massive private-sector investment in broadband with the chronic under-investment in heavily regulated public utility sectors to confirm that this is true.[7] America's drinking water infrastructure is in need of $1 trillion in investment in the coming decades, and our electric grid will require a $736 billion capital infusion by 2020 to keep it from failing.[8] By contrast, in 2013, four of top 20 U.S. companies by capital expenditures in *any* industry were broadband providers—AT&T, Verizon, Comcast, and Time Warner Cable.[9]

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5 *See* USTelecom, "Broadband Investment," *available at* http://www.ustelecom.org/broadband-industry/broadband-industry-stats/investment.

6 *See* NCTA Comments at 6.

7 *See id.* at 23.

8 *See* American Society of Civil Engineers, *2013 Report Card for America's Infrastructure*, http://www.infrastructurereportcard.org.

9 Progressive Policy Institute, *U.S. Investment Heroes of 2014: Investing at Home in a Connected World*, at 3 (Sep. 2014), *available at* http://www.progressivepolicy.org/wp-content/uploads/2014/10/2014.09-Carew_Mandel_US-Investment-Heroes-of-2014_Investing-at-Home-in-a-Connected-World.pdf.

The European example of regulating broadband as a public utility is also instructive.[10] Broadband providers in the United States invest more than twice as much as their counterparts in the European Union on a per-household basis.[11] As a result, while 85 percent of the U.S. population now has access to broadband networks capable of providing 100 Mbps speeds, "just over half of European homes can access speeds of 30 Mbps or greater."[12] Analysts have directly linked this superior level of broadband investment in the United States to the Commission's restrained regulatory approach as compared to the European model.[13]

And the experience of cable television providers following passage of the 1992 Cable Act teaches the same lesson. After the 1992 Act imposed heavy-handed regulations on cable television providers—modeled largely on common carrier principles—there was a sharp decline in new programming and channel offerings.[14] While investment in the unregulated broadband side of the business flourished, investment in the cable television business plummeted.[15] Only when Congress liberalized regulation applicable to cable television providers did the sector begin to rebound.[16]

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10 *See* Prof. Christopher S. Yoo, *U.S. vs. European Broadband Deployment: What Do the Data Say?* (Jun. 2014), available at https://www.law.upenn.edu/live/files/3353-us-vs-european-broadband-deployment-summary ("Yoo Study").

11 *See* Roslyn Layton, The European Union's Broadband Challenge, American Enterprise Institute for Public Policy Research, at 2 (Feb. 2014), available at http://www.aei.org/files/2014/02/18/-the-european-unions-broadbandchallenge_175900142730.pdf ("Layton Article").

12 *Id.* at 1; *see also* Yoo Study at 1 (finding that only 52 percent of E.U. households have access to broadband networks delivering more than 25 Mbps).

13 Yoo Study at 1 ("Disparities between European and U.S. broadband networks stemmed from differing regulatory approaches"); *see also* Martin H. Thelle & Bruno Basalisco, Copenhagen Economics, *Europe Can Catch Up With the US: A Contrast of Two Contrary Broadband Models* 3 (June 2013) (found that "the US generally comes out better in terms of broadband supply, quality and price" than the E.U., due largely to the divergent regulatory approaches); Layton Article at 1 ("Europe's 'leased-access' approach where ISPs lease transmission lines at regulated rates from incumbent telecom firms, [provides] no incentives to invest in the underlying facility.").

14 Reply Comments of Bright House Networks, GN Docket Nos. 14-28, 10-127, at 2 (filed Sep. 15, 2014).

15 *Id.* at 3.

16 *Id.* A similar study by Professor Babette Boliek found that heavy-handed state regulation of wireless telecommunications services prior to the enactment of Section 332 tended to result in *higher* consumer prices. *See* Babette E.L. Boliek, *Wireless Net Neutrality Regulation and the Problem with Pricing: An Empirical, Cautionary Tale*, 16 MICH. TELECOMM. TECH. L. REV. 1, 41, 47 (2009).

The lesson of this history is clear: heavy-handed regulation (or the threat of it) reduces investment, impedes innovation, and harms consumers. Recent submissions in this proceeding have debated the *extent* to which reclassification would reduce investment in the nation's broadband networks.[17] But the near unanimity of parties that have actually invested in those networks leaves no doubt that imposing Title II will have *some* negative impact on investment incentives.[18] At a time when broadband providers are currently contemplating large-scale infrastructure upgrades to enable Gigabit-level speeds and other substantial consumer benefits, such diminished investment incentives would translate directly into diminished economic growth and consumer welfare.[19] Such a drag on investment incentives also would greatly diminish the nation's ability to meet the goals laid out in the *National Broadband Plan*, including the expansion of broadband coverage to communities that need it most.[20]

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17 *Compare* Letter of US Telecom to Marlene H. Dortch, Secretary, FCC, GN- Docket No. 14-28 at 4 (filed Nov. 19, 2014) (citing Kevin Hassett & Robert Shapiro, *The Impact of Title II Regulation of Internet Providers On Their Capital Investments*) (estimating that investment in broadband networks will decrease by 17.8 to 31.7 percent under Title II) *with* Letter of Free Press to Marlene H. Dortch, Secretary, FCC, GN-Docket No. 14-28 (filed November 21, 2014) (criticizing the US Telecom study).

18 *See, e.g.*, Comments of the American Cable Association, GN Docket Nos. 14-28, 10-127, at 60-66 (filed Jul. 17, 2014); Comments of Akamai Technologies, Inc., GN Docket Nos. 14-28, 10-127, at 9-11 (filed Jul. 15, 2014); Comments of Alcatel-Lucent, GN Docket Nos. 14-28, 10-127, at 2 (filed Jul. 15, 2014); Comments of Arris Group, Inc., GN Docket Nos. 14-28, 10-127, at 11-14 (filed Jul. 15, 2014); Comments of AT&T Services, Inc., GN Docket Nos. 14-28, 10-127, at 51-53 (filed Jul. 15, 2014) ("AT&T Comments"); Comments of CenturyLink, GN Docket Nos. 14-28, 10-127, at 5-6 (filed Jul. 17, 2014); Comments of Charter Communications, Inc., GN Docket Nos. 14-28, 10-127, at 15-16 (filed Jul. 18, 2014); Comments of Cisco Systems, Inc., GN Docket Nos. 14-28, 10-127, at 27 (filed Jul. 27, 2014); Comments of CTIA – The Wireless Association, GN Docket Nos. 14-28, 10-127, at 46-48 (filed Jul. 18, 2014); Comments of Cox Communications, Inc., GN Docket Nos. 14-28, 10-127, at 34-36 (filed Jul. 18, 2014); Comments of Ericsson, GN Docket Nos. 14-28, 10-127, at 10-11 (filed Jul. 17, 2014); Comments of Frontier Communications, GN Docket No. 14-28, at 2-4 (filed Jul. 18, 2014); Comments of Qualcomm, Inc., GN Docket Nos. 14-28, at 4-7 (filed Jul. 15, 2014).

19 *See, e.g.*, Letter of Matthew A. Brill, Latham & Watkins LLP, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (filed Oct. 2, 2014) (describing investment plans of Mediacom and Suddenlink and adverse impacts that would accompany Title II reclassification based on increased cost of capital).

20 *See* Federal Communications Commission, *Connecting America: The National Broadband Plan*, at xi (2010). Notably, recent bidding in the AWS-3 auction does *not* demonstrate that Title II reclassification would have no impact on broadband investment. First, investment in scarce spectrum resources is inherently different from other forms of broadband investment. Because ISPs have no control over whether and when additional suitable spectrum will become available, the risk of *not* investing in spectrum is

The harms of Title II would not be limited to dampened investment incentives and innovation. Reclassification also would open the door to state regulation and taxation of the Internet. The American Consumer Institute notes that reclassification "could subject [broadband provider] revenues to tax at the average rate of 17% presently imposed upon other telecommunication services."[21] And a recent study by the Progressive Policy Institute estimates that state and local taxes could force consumers to pay an average of $67 more per year for fixed broadband and $72 more for wireless, if those services are regulated under Title II.[22] While Title II proponents have challenged these findings, pointing to actions Congress or the Commission might take to diminish these effects,[23] those challenges at most quibble with the magnitude of the adverse impact.[24] At bottom, the risk of such harm is undeniable—and also is entirely absent from Section 706 alternative before the Commission.

Reclassifying broadband providers as common carriers also would harm consumers by divesting the FTC of authority to protect them in the broadband arena. Over the past decade, the

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particularly high, especially given the prospect that an ISP's competitors *would* decide to bid aggressively at auction. While it therefore may be the case that ISPs would not *completely* stop investing in scarce spectrum resources in the event of Title II reclassification, the record leaves no doubt that reclassification would hinder the actual deployment of advanced broadband networks. Second, even if it were reasonable to assume that bidders believed that Title II reclassification was a foregone conclusion—notwithstanding the NPRM's proposal to proceed under Section 706 and the absence of any subsequent notice of a planned change in direction—it is impossible to know whether and to what extent the bidding would have been higher absent such an assessment. And third, it would be just as reasonable to assume that many bidders believed the Commission would forbear completely from Title II obligations in the event of reclassification, particularly given that the Commission's confirmed authority under Section 706 to adopt strong open Internet rules renders Title II's restrictions unnecessary.

21 Letter of the American Consumer Institute to Marlene H. Dortch, Secretary, FCC, GN-Docket No. 14-28, at 3 (filed Nov. 18, 2014) (citing David Tuerck, Paul Bachman, Steven Titch and John Rutledge, "Taxes and Fees on Communications Services," The Heartland Institute, #113, May 2007, p. 1.).

22 Progressive Policy Institute, *Outdated Regulations Will Make Consumers Pay More for Broadband*, at 3 (Dec. 2014), available at http://www.progressivepolicy.org/wp-content/uploads/2014/12/2014.12-Litan-Singer_Outdated-Regulations-Will-Make-Consumers-Pay-More-for-Broadband.pdf.

23 *See* Letter of Free Press to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (filed Dec. 14, 2014).

24 *See* Letter of Progressive Policy Institute to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (filed Dec. 16, 2014) (noting that neither congressional extension of the Internet Tax Freedom Act nor any designation of broadband as an interstate service by the Commission would eliminate the possibility of new taxation).

FTC has amassed an impressive track record of protecting consumers in this area.[25] But their authority to do so would evaporate upon reclassification, as "common carriers" are expressly excluded from the scope of the FTC's jurisdiction.[26]

Reclassification also would have implications for the broader Internet ecosystem. As many commenters have noted, abandoning the long-settled information-service classification of broadband Internet access service could put the Commission on a slippery slope toward the imposition of Title II regulation on an array of other actors in the Internet ecosystem. "[O]nce the Commission separates transmission from information processing, there is no way logically to limit that rationale to one segment of the Internet and not others."[27] A contrived attempt to do so might well be deemed arbitrary and capricious.

Finally, several commenters have warned that reclassification could even have international implications, weakening the United States' foreign policy on Internet regulation.[28] As Verizon notes, "[i]t would set a dangerous precedent at a time when the United States has needed to fight vigilantly against international bodies and even repressive regimes that seek greater control over the Internet."[29]

In sum, whatever the political expediency of Title II, the harms would substantially outweigh any perceived benefits. Exchanging the Commission's light-touch regulatory regime for a heavy-handed Title II approach would be the wrong decision for broadband investment, Internet innovation, economic growth, and the American consumer.

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25 *See, e.g.*, Federal Trade Commission, Broadband Competition Connectivity Policy (2007), *available at* http://www.ftc.gov/reports/broadband/v070000report.pdf; Press Release, *FTC Shuts Down Notorious Rogue Internet Service Provider*, Jun. 4, 2009, available at http://www.ftc.gov/news-events/press-releases/2009/06/ftc-shuts-down-notorious-rogue-internet-service-provider-3fn; *see also* John Eggerton, *FTC Steaming Over Streaming Video 'Cramming'*, Broadcasting & Cable, May 8, 2012, available at http://www.broadcastingcable.com/news/washington/ftc-steaming-over-streaming-video-cramming/60119.

26 *See* 15 U.S.C. § 45(a)(2) (exempting "common carriers" from the scope of the FTC's regulatory authority); FTC Commissioner Maureen K. Ohlhausen, *100 Is the New 30: Recommendations for the FTC's Next 100 Years*, Feb. 7, 2014, at 8, available at http://www.ftc.gov/system/files/documents/public_statements/100-new-30-recommendations-ftcs-next-100-years/140207gcrantitrust-mko.pdf ("[R]eclassifying broadband as a common carrier service . . . would hamper the FTC's efforts in both the competition and consumer protection areas.").

27 *See* Letter of Robert W. Quinn, Jr., AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 6 (filed May 9, 2014).

28 *See, e.g.*, Comments of Verizon and Verizon Wireless, GN Docket Nos. 14-28, 10-127, at 56 (filed Jul. 15, 2014) ("Verizon Comments"); Comments of Comcast Corp., GN Docket Nos. 14-28, 10-127, at 49 (filed Jul. 15, 2014) ("Comcast Comments").

29 Verizon Comments at 56.

B. Abandoning the Commission's Long-Held Classification of Broadband Internet Access as an Information Service Likely Would Be Unlawful

Abandoning more than a decade of precedent on the appropriate classification of broadband Internet access service also would be unsupportable as a matter of law. As the Commission and the courts have recognized, the proper classification of broadband Internet access service does not depend solely on the policy goals the Commission seeks to achieve. The Commission must focus on "the nature of the functions that the end user is offered" by the broadband provider[30] or, as the Supreme Court put it in *Brand X*, "the *factual particulars* of how Internet technology works and how it is provided."[31] When the Commission issued the NPRM, it sensibly proposed to abide by its long-standing information-service classification.[32] Nothing that has occurred since then calls into question the validity of that proposal.

Since 2002, the Commission has considered the factual particulars of broadband Internet access service on four different occasions, and correctly classified broadband Internet access service as an "information service" every time.[33] Under the Telecommunications Act of 1996, "[t]he term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[34] Broadband Internet access service clearly fits the bill. As the Commission explained in the *Cable Modem Order*, the service "combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications" and supporting functions, including e-mail, web browsing, and Domain Name System ("DNS") service.[35] And while it "provides the[se] capabilities . . . 'via telecommunications,'" the telecommunications component is not "separable from the data-processing capabilities of the service."[36] Rather, as the Commission stated in the *Wireline*

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30 *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 ¶ 38 (2002) ("*Cable Modem Order*").

31 *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 991 (2005) (emphasis added).

32 NPRM ¶ 142.

33 *See Cable Modem Order*; *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 ¶ 9 (2005) ("*Wireline Broadband Order*"); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281 ¶ 1 (2006) ("*BPL Order*"); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007) ("*Wireless Broadband Order*").

34 47 U.S.C. § 153.

35 *Cable Modem Order* ¶ 38.

36 *Id.* ¶ 39.

Broadband Order, broadband Internet access service "is a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service."[37]

The Supreme Court has confirmed the reasonableness of that classification. In *Brand X*, the Court specifically noted a host of integrated, information-processing functions inherent in the provision of Internet access service that supported the Commission's findings.[38] The Court observed that "[a] user cannot reach a third-party without DNS functionality" made available as part of the service, and that "the Internet service provided by cable companies facilitates access to third-party Web pages by offering consumers the ability to store, or 'cache,' popular content on local computer servers."[39] The Court agreed with the Commission that "'[t]he service that internet access providers offer to members of the public is internet access,' not a transparent ability (from the end user's perspective) to transmit information."[40]

The Commission now appears to be on the verge of changing course, seemingly driven not by the record, but by a statement by the President. Administrative agencies generally are free to change their minds, and to revisit prior orders and policies. But that authority is not without limits. Where the agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," or "when its prior policy has engendered serious reliance interests that must be taken into account," it must "provide a more detailed justification" for departing from its prior position "than what would suffice for a new policy created on a blank slate."[41] "It would be arbitrary or capricious to ignore such matters."[42]

Both factors requiring heightened justification are present here. As just described, any decision to reclassify broadband Internet access service as a "telecommunications service" would necessarily rest on factual findings that conflict with the findings on which the Commission has repeatedly relied in adopting its "information service" classification.[43] And there is no question that reclassification would massively undermine reliance interests engendered by the Commission's prior rulings. As noted above, broadband providers have invested more than $1.2

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37 *Wireline Broadband Order* ¶ 9.

38 *Brand X*, 545 U.S. at 979.

39 *Id.* at 999-1000.

40 *Id.* at 1000 (internal citations omitted).

41 *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009).

42 *Id.*

43 *See Brand X*, 545 U.S. at 991 ("the entire question . . . turns not on the language of the Act but on the factual particulars of how Internet technology works and how it is provided").

trillion in broadband infrastructure based on the Commission's repeated, express assurances that it would continue to treat broadband as a lightly regulated "information service" under Title I.[44]

The Commission would be hard-pressed to provide the detailed justification that such a drastic reversal would require—a burden that may have been magnified by the President's recent assertion of the Executive's view of what the Commission, an independent agency, should do.[45] The President's policy preferences aside, the Commission would need to explain how the provision of broadband services no longer involves "a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission."[46] And the Commission cannot credibly do so. The data transmission provided by broadband Internet access service today is just as integrated with information-processing capabilities as it was when the Commission made its prior "information service" classifications—if not more so. The service still includes the same "protocol conversion, IP address number assignment, domain name resolution through a domain name system (DNS), network security, and caching" functions that both the Commission and Supreme Court concluded made it an "information service."[47] And, indeed, the service now includes significant additional—and even more functionally integrated—data-processing capabilities. Broadband providers have integrated new functionalities like spam protection, pop-up blockers, parental controls, cloud-based storage, reputation systems for processing potentially harmful data, cloud-based storage, and more.[48]

Title II proponents argue that not all consumers use all of these capabilities.[49] And that is no doubt true. But that has *always* been the case, and the Commission's prior orders recognize

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44 *See, e.g., Cable Modem Order* ¶¶ 4, 5 (explaining that "broadband services should exist in a minimal regulatory environment that promotes investment" and limits "unnecessary and unduly burdensome regulatory costs"); *Wireline Broadband Order* ¶ 3 (explaining that a "lighter regulatory touch … will promote the availability of competitive broadband Internet access services to consumers, via multiple platforms, while ensuring adequate incentives are in place to encourage the deployment and innovation of broadband platforms"); *BPL Order* ¶ 2 ("[A] minimal regulatory environment for BPL-enabled Internet access service … promotes our goal of ubiquitous availability of broadband to all Americans."); *Wireless Broadband Order* ¶ 27 ("Through this classification, we provide the regulatory certainty needed to help spur growth and deployment of these services.").

45 *See* Randolph J. May, *Obama's Involvement Jeopardizes FCC's Net Neutrality Efforts*, The Hill (Dec. 11, 2014), http://thehill.com/blogs/pundits-blog/technology/226744-obamas-involvement-jeopardizes-fccs-net-neutrality-efforts.

46 *Wireline Broadband Order* ¶ 9.

47 *See Brand X*, 545 U.S. at 999-1000.

48 *See* NCTA Comments at 34; NCTA Reply Comments at 20; AT&T Comments at 49; Verizon Comments at 59-61.

49 *See, e.g.*, Comments of Free Press, GN Docket Nos. 14-28, 10-127, at 70 (filed Jul. 17, 2014) ("Free Press Comments"); Comments of the Ad Hoc Telecommunications Users Committee, GN Docket No. 14-28, at 5 (filed Jul. 18, 2014); Comments of the Center for

that "[t]he information service classification applies regardless of whether subscribers use all of the functions and capabilities provided as part of the service."[50] The legal question for classification is what broadband providers *offer*.[51] And this wide array of new features and functionalities all illustrate that today, more than ever before, "Internet access service is perceived and offered as far more than a pure 'connectivity' service.'"[52] It would be arbitrary and capricious for the Commission to conclude otherwise.

Nor is it any more feasible that the Commission could legally *compel* broadband providers to offer a functionally distinct, pure telecommunications service to consumers.[53] As an initial matter, the NPRM fails to identify any statutory authority for such a mandate—which the Commission has characterized as "radical surgery."[54] The Act defines "common carrier" simply as "any person *engaged* as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy," and says nothing about compelling entities to "engag[e]" in providing such a service.[55] Even where the Commission has claimed similar authority to force a private telecommunications carrier to offer service on a common carrier basis, it has acknowledged that may do so *only* if the carrier "'has sufficient market power to warrant regulatory treatment as a common carrier.'"[56] The record in this proceeding plainly could not support such a finding; to the contrary, the record confirms that the broadband marketplace is competitive and that such competition continues to grow stronger.[57] And even if the Commission had concerns about competition in certain isolated local markets, it could not base a nationwide finding of market power based on such regional concerns.[58] Finally,

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Democracy and Technology, GN Docket Nos. 14-28, 10-127, at 11-12 (filed Jul. 17, 2014); Comments of Public Knowledge, GN Docket Nos. 14-28, 10-127, 09-191 at 70-71(filed Jul. 15, 2014).

50 *Wireline Broadband Order* ¶ 15.

51 *Brand X*, 545 U.S. at 991.

52 AT&T Comments at 49.

53 NPRM ¶ 150.

54 *Cable Modem Order* ¶ 43; *see FCC v. Midwest Video Corp.*, 440 U.S. 689, 709 (1979) (noting that authority to compel common carrier status "must come specifically from Congress")

55 47 U.S.C. § 153(11) (emphasis added).

56 *See Virgin Islands Tele. Corp. v. FCC*, 198 F.3d 921, 925 (D.C. Cir. 1999) (quoting *AT&T Submarine Sys., Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 21585, 21589 (1998)).

57 *See, e.g.*, NCTA Comments at 13 (describing competitive market for broadband Internet access services).

58 A finding of market power typically requires defining the relevant market, *see United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001), including both the product and the geographic market, *see Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1024 (10th Cir. 2002). With substantial variations in competitors among local areas and the

as other commenters have noted, seeking to compel the provision of a common carrier telecommunications service would potentially raise constitutional issues in additional to statutory concerns.[59]

Proponents of Title II suggest that it would give the Commission the greatest flexibility to regulate broadband Internet access. In fact, taking the wholly unnecessary step of reclassifying broadband Internet access service to advance the Commission's policy goals would present a serious risk of a third reversal of the Commission's open Internet rules. As NCTA and others have explained in depth, the Commission has ample authority under Section 706 to protect the open Internet and achieve its policy goals.[60] The Commission should use that authority to avoid the serious legal issues presented by the Title II approach.

II. IF THE COMMISSION PURSUES RECLASSIFICATION, THEN IT SHOULD GRANT FORBEARANCE FROM TITLE II OBLIGATIONS

If, despite these serious problems, the Commission seeks to reclassify broadband Internet access or any component thereof as a "telecommunications service," then the Commission should grant ISPs immediate forbearance from Title II's obligations and restrictions in a streamlined fashion to mitigate the significant harms that otherwise would result from reclassification. The *Verizon* court made clear that Section 706, on its own, authorizes the sorts of prohibitions on blocking, unreasonable discrimination, and paid prioritization adopted in the *2010 Open Internet Order*, and invalidated those rules only because they appeared to subject

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unlikelihood that consumers will move to change their broadband provider, the relevant geographic market for broadband Internet access is clearly not a national one. *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, Memorandum Opinion and Order, 16 FCC Rcd 6547 ¶ 74 (2001) ("The relevant geographic markets for residential high-speed Internet access services are local. . . . While high-speed ISPs other than cable operators may offer service over different local areas (*e.g.*, DSL or wireless), or may offer service over much wider areas, even nationally (*e.g.*, satellite), a consumer's choices are dictated by what is offered in his or her locality."); *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662 ¶ 114 (2007) ("the relevant geographic markets for residential high-speed Internet access services are local"); *see also Westman Com. Co. v. Hobart International, Inc.*, 796 F.2d 1216, 1222 (10th Cir. 1986) (the relevant geographic market is "'the narrowest market which is wide enough so that products from adjacent areas . . . cannot compete on substantial parity with those included in the market'") (quoting L. Sullivan, *Handbook of the Law of Antitrust* § 12, at 41 (1977)).

59 *See* Verizon Comments at 47, 67-68 (identifying Takings Clause and First Amendment concerns with compelled common carrier status).

60 *See, e.g.*, NCTA Comments at 45-47; NCTA Reply Comments at 24-30.

information service providers to impermissible common carriage mandates.[61] The purpose of reclassification is to remove this impediment to the Commission's Section 706 authority and thus enable the reinstatement of the 2010 rules. Accordingly, the Commission can attain this goal without any need to retain the various obligations or restrictions codified in Title II, including Sections 201, 202, and 208. To be sure, NCTA and others have voiced concerns in the past over the uncertainty that forbearance proceedings could entail, and it remains unclear whether complete forbearance would resolve all of the concerns raised in the record. It is clear, however, that the Commission's best hope for mitigating the harmful effects of Title II reclassification would be to act decisively in granting forbearance from all of Title II's obligations on a nationwide basis as an integral part of any reclassification decision.[62]

As explained below, granting ISPs forbearance from Title II in this manner would be both defensible as a legal matter and justified as a factual matter. To begin with, such an approach would be consistent with Commission precedent, both in the broadband context and in factually analogous circumstances where the Commission sought to shield the dynamic and evolving wireless industry from the full weight of Title II.[63] In fact, many proponents of Title II are now on record at the Commission supporting a streamlined approach and disclaiming the kind of highly granular analysis applied to the regulation of legacy telephone services in the *Qwest Phoenix Order*.[64] The record also demonstrates that Title II's provisions are not "necessary" to protect competition, consumers, or the public interest—as broadband providers have delivered constantly improving services at declining per-megabyte prices to an ever-growing number of consumers absent any Title II obligations. And with the Commission's

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61 *See Verizon*, 740 F.3d at 635, 657.

62 The Commission should reject Free Press's alternative proposal to "defer[] decisions on some [provisions of Title II] while staying their application during the pendency of such consideration." Letter of Matthew Wood, Policy Director, Free Press, to Marlene Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 2 (filed Dec. 4, 2014). As an initial matter, delaying a decision on forbearance until well after any reclassification decision would generate substantial regulatory uncertainty by leaving in place a real threat of overbroad and burdensome common-carrier regulation. Moreover, it is not at all clear that the Commission has authority to "suspend" provisions of Title II temporarily apart from the forbearance procedures set forth in Section 10. If the Commission finds that the elements in Section 10 are met in the short run, such findings also would justify granting forbearance indefinitely.

63 As noted below, the Commission's power to grant forbearance to providers of commercial mobile radio services under Section 332 of the Act was more limited than it is under Section 10, which authorizes the Commission to forbear from applying *all* of Title II's obligations and restrictions.

64 *See infra* at 17-18; *see also Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd 8622 ¶¶ 41-45 (2010) ("*Qwest Phoenix Order*") (subsequent history omitted).

judicially confirmed authority to adopt rules under Section 706 as a backstop, it is entirely unnecessary to subject ISPs to prophylactic Title II regulations in the event of reclassification.

A. Commission Precedent Supports Granting Nationwide Forbearance to Broadband Providers in a Streamlined Fashion

The Commission has long recognized that it would be appropriate to grant ISPs broad forbearance from Title II obligations in a streamlined manner if it were to reclassify broadband Internet access as a "telecommunications service." In 2002, the Commission tentatively concluded that any classification of cable modem service under Title II should be accompanied by blanket forbearance, explaining that "that the public interest would be served by the uniform national policy that would result from the exercise of forbearance to the extent cable modem service is classified as a telecommunications service."[65] This view comports with Section 706, which instructs the Commission to use "regulatory forbearance" to promote the twin goals of promoting broadband deployment and adoption.[66] In fact, the Commission has expressly acknowledged that its analysis of forbearance in the broadband context must be "informed by [S]ection 706 of the 1996 Act, which . . . directs us to promote the timely and comprehensive deployment of broadband facilities."[67]

The Commission reiterated this conclusion in the 2010 *Third Way NOI*, which recognized that the "forbearance analysis here has a different posture" from those instances where legacy telephone providers have sought forbearance from preexisting regulatory obligations.[68] In considering forbearance in the broadband context, the Commission explained that it would not "be responding to a carrier's request to change the legal and regulatory framework that currently applies," but rather "would be assessing whether to forbear from provisions of the Act that, because of our information service classification, *do not apply* at the time of the analysis."[69] For this reason, the *Third Way NOI* contemplated forbearing from Title II in a manner that would "maintain a deregulatory status quo for . . . broadband Internet service that applies across the nation."[70]

This crucial recognition of the different regulatory "posture" of broadband—and the resulting need for comprehensive and streamlined forbearance to maintain the "deregulatory

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65 *See Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 ¶ 95 (2002), *aff'd sub. nom. NCTA v. Brand X*, 545 U.S. 967 (2005).

66 47 U.S.C. § 1302(a).

67 *Verizon Telephone Companies Forbearance from Section 271 Unbundling Requirements, et al.*, Memorandum Opinion and Order, 19 FCC Rcd 21496 ¶ 34 (2004).

68 *Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd 7866 ¶ 70 (2010) ("*Third Way NOI*").

69 *Id.*

70 *Id.* ¶ 73.

status quo" in the event of Title II reclassification—is also reflected in the *Qwest Phoenix Order*. There, as NCTA and others have pointed out, the Commission applied a more granular analysis to a dominant carrier's request for forbearance from preexisting regulatory obligations. But the Commission also specified that "a different analysis may apply when the Commission addresses advanced services, like broadband services, instead of a petition addressing legacy facilities, such as Qwest's petition in this proceeding."[71] The logic of this distinction is self-evident; unlike the requests from dominant telecommunications carriers for forbearance from preexisting regulatory obligations, ISPs would be seeking to avoid the imposition of an entirely new regulatory framework, so it would make little sense to engage in a highly detailed, market-by-market, provision-by-provision forbearance analysis in such circumstances.

And indeed, the Commission *has* granted wide-ranging, nationwide forbearance in factually analogous circumstances, most notably when commercial mobile radio services ("CMRS") faced the prospect of full-blown Title II regulation for the first time in the early 1990s.[72] There, as here, the Commission sought to avoid saddling a flourishing and dynamic industry with unwarranted common-carrier obligations. And, as discussed below, the Commission was able to use a more *limited* grant of forbearance authority to exempt CMRS providers from many of Title II's provisions in a streamlined fashion, without the need for a granular, market-by-market analysis, and in spite of the finding that robust competition likely was *not* present in many local areas.

In particular, the Commission concluded in the 1994 *CMRS Forbearance Order* that nationwide forbearance from large swaths of Title II was warranted based on national marketplace conditions—even as it acknowledged that the duopoly structure of the cellular marketplace meant that cellular providers may well have possessed market power in local markets across the country.[73] The Commission specifically held that the "state of competition regarding cellular services does not preclude our exercise of forbearance authority," notwithstanding its finding that "the record does not support a conclusion that cellular services are fully competitive,"[74] and that "duopoly providers" in many markets may be able "to elevate rates above their competitive levels."[75] While some commenters had suggested that maintaining Title II's provisions was necessary to promote competition and protect consumers, and that granting broad forbearance would hinder such competition, the Commission concluded that just the opposite was true with respect to the dynamic and growing CMRS marketplace. Among

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71 *Qwest Phoenix Order* ¶ 39.

72 *See generally Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411 (1994) ("*CMRS Forbearance Order*").

73 *See CMRS Forbearance Order* ¶ 137 ("[T]he record supports a finding that all CMRS service providers, *other than cellular service licensees*, currently lack market power." (emphasis added)).

74 *Id*. ¶ 138.

75 *Id.* ¶ 146.

other things, the Commission observed that requiring CMRS providers to file tariffs could stand in the way of "rapid, efficient responses to changes in demand and cost," "remove incentives for carriers to introduce new offerings," "impede and remove incentives for competitive price discounting," and ultimately "increase rates for consumers."[76] By the same token, the Commission found that entry and exit certification requirements could "actually deter entry of innovative and useful services."[77]

If the Commission can use a streamlined approach in the face of a possible "shared monopoly" among incumbent cellular providers in many local markets,[78] it can certainly adopt such an approach in the far more competitive and dynamic broadband marketplace. As NCTA has noted in prior submissions,[79] the broadband industry is becoming increasingly competitive and differentiated, as close to 100 percent of U.S. households are in census tracts in which two broadband providers (either fixed or mobile) offer service, and 99 percent of U.S. households are in census tracts in which three such providers (either fixed or mobile) offer service.[80] Even when the sample size is limited to fixed providers, 99 percent of U.S. households are in census tracts where at least two fixed wireline broadband providers offer service, and 78 percent of U.S. households are in census tracts with at least three.[81] Moreover, according to a recent Department

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76 *Id.* ¶ 177.

77 *Id.* ¶ 182. The Commission did not grant broader forbearance from Sections 201, 202, and 208 in the 1994 *CMRS Forbearance Order* only because the relevant statute—in that case, Section 332 of the Act—precluded the Commission from forbearing from those sections for CMRS providers. *See* 47 U.S.C. § 332(c)(1)(A). Although the Commission later asserted authority under Section 10—enacted three years after Section 332—to forbear from Sections 201 and 202 in the CMRS context, and denied a request from PCIA in 1998 to forbear from those sections, that order is distinguishable from the open Internet context in various respects. *See Personal Communications Industry Association's Petition for Forbearance*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857 ¶¶ 15-31 (1998) ("*1998 PCIA Order*"). As discussed further below, the experience in the broadband marketplace over the last decade-plus, during which unprecedented levels of investment have delivered ever-improving speeds and declining per-Mbps rates to consumers *without* Sections 201 or 202, demonstrates that those provisions are not "necessary" to protect competition, consumers, or the public interest. *See infra* at 19-20. Moreover, the Commission can rely on Section 706 as a regulatory backstop for any further consumer-protection regulation that may be warranted in the broadband arena, thus obviating the need for Sections 201 or 202 as potential bases for such regulation. *See infra* at 21.

78 *CMRS Forbearance Order* ¶ 146.

79 *See* NCTA Comments at 13-14.

80 *See* FCC, *Internet Access Services: Status as of June 30, 2013*, at 10 & Fig. 5(b) (Jun. 2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0625/DOC-327829A1.pdf.

81 *See id.* at 9 & Fig. 5(a).

of Commerce study, even "[a]t somewhat higher speeds" than the Commission's baseline definition for broadband, "such as 10 Mbps, the typical person still is able to choose among two fixed ISPs . . . [and] also has the option of choosing among three mobile ISPs."[82] These market conditions—which will only grow more competitive as wireline, wireless, satellite, and other providers continue to enhance and expand their broadband offerings—make streamlined forbearance even more appropriate in the broadband context than it was in the CMRS context.[83]

Such an approach finds support even among the most zealous supporters of Title II reclassification. For example, Free Press has urged the Commission to follow the blueprint from the CMRS context, in part because broadband "is offered in a non-monopoly market" for "the substantial majority of the country."[84] Free Press also has argued that the Commission could "forbear on its own motion, without any of the petitions and the process" that characterized the *Qwest* proceeding.[85] Public Knowledge similarly has stated that "the Commission can easily forbear from any Title II regulations found to be inapplicable to broadband internet access services" without a "laborious, front-loaded process,"[86] and one of its senior representatives has published blogs characterizing forbearance as "easy peasy,"[87] while arguing at length that the Commission need not and should not apply the more granular *Qwest* standard in evaluating

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82 U.S. Dept. of Commerce, *Competition Among U.S. Broadband Service Providers* (Dec. 2014), at 1, *available at* http://www.esa.doc.gov/sites/default/files/reports/documents/competitionamongusbroadbandserviceproviders.pdf. While the study found that fewer ISPs currently offer "very-high-speed broadband service," *id.*, that number undoubtedly will continue to grow in the years to come, as ISPs of all stripes continue to enhance their offerings. *See, e.g., Use of Spectrum Bands Above 24 GHz for Mobile Radio Services*, GN Docket No. 14-177, Notice of Inquiry, FCC 14-154, ¶ 34 (rel. Oct. 17, 2014) (noting that 5G mobile wireless services currently under development "would provide data rates up to 10 Gbps maximum and at least 100 Mbps at cell edges").

83 Notably, nationwide forbearance *has* been granted for broadband-related services in at least one case (in which a Verizon petition was "deemed granted" under Section 10(c) of the Act), and there is no reason to conclude that such forbearance has resulted in any harm to competition or consumers. *See* News Release, *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law* (rel. Mar. 20, 2006).

84 Free Press Comments at 42-44.

85 Reply Comments of Free Press, GN Docket Nos. 14-28, 10-127, at 26-27 (filed Sep. 15, 2014).

86 Reply Comments of Public Knowledge, GN Docket Nos. 14-28, 10-127, at 23 (filed Sep. 15, 2014).

87 *See* Harold Feld, *Forbearance Redux—Still Easy Peasy*, WetMachine, Oct. 2, 2014, *available at* http://www.wetmachine.com/tales-of-the-sausage-factory/forbearance-redux-still-easy-peasy/.

forbearance for broadband providers.[88] Edge providers are on board with a streamlined forbearance process as well—with the Internet Association (representing Google, Amazon, and many others) noting that the Commission could forbear without taking any action at all by allowing a petition for forbearance to be "deemed granted" under Section 10(c) as a means of providing relief from Title II's provisions.[89]

At the same time, both Chairman Wheeler and President Obama and have made clear that reclassification would be aimed solely at adopting a narrow set of open Internet rules, rather than subjecting the broadband industry to a regulatory regime designed for monopoly telephone companies.[90] Similarly, during the 2010 "Third Way" proceeding, Commissioner Clyburn explained that "without forbearance there is no reclassification"—likening the two concepts to "peanut butter and jelly" or "Batman and Robin"—and that shielding broadband from "old-world rules" was the "entire point" of the Commission's proposal.[91] More recently, Congressman Waxman urged the Commission to couple reclassification with forbearance from virtually all of Title II, including Sections 201 and 202, in order to "avoid the Title II precedents that were initially developed for regulation of telephone services."[92] Congresswoman Eshoo likewise recognized that forbearance would be necessary "to tailor the law for market circumstances" and to avoid "heavy-handed regulation" of broadband,[93] and has suggested that the Commission should forbear from every provision in Title II but Section 202(a).[94]

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88 *See id.*

89 *See* Reply Comments of The Internet Association, GN Docket Nos. 14-28, 10-127, at 11 (filed Sep. 10, 2014) (asserting that the FCC "could forbear from applying virtually all provisions of Title II" on a nationwide basis "simply through the device of failing to rule on a petition for such forbearance 'within one year after the Commission receives it'").

90 *See* Press Release, *FCC Chairman Tom Wheeler's Statement on President Barack Obama's Statement Regarding Net Neutrality* (rel. Nov. 10, 2014) (asserting that the Commission's "goal [is] simple: to reach the outcomes sought by the 2010 rules"); White House, *Statement by the President on Net Neutrality,* Nov. 10, 2014, *available at* http://www.whitehouse.gov/the-press-office/2014/11/10/statement-president-net-neutrality (proposing forbearance "from the Title II regulations that are not needed to implement" open Internet regulations).

91 "Broadband Authority and the Illusion of Regulatory Certainty," Prepared Remarks of Commissioner Mignon L. Clyburn, Media Institute Luncheon, at 2 (June 3, 2010).

92 Letter from Congressman Henry A. Waxman to Tom Wheeler, Chairman, FCC, GN Docket No. 14-28 (filed Oct. 3, 2014).

93 Letter from Congresswoman Anna G. Eshoo to Tom Wheeler, Chairman, FCC, GN Docket No. 14-28 (filed Oct. 22, 2014); *see also* Letter from Representative Zoe Lofgren to Tom Wheeler, Chairman, FCC, GN Docket No. 14-28, at 1-2 (Oct. 8, 2014) ("It is true that reclassifying all broadband Internet access services as title II services is not without some concern, which is why it should be done as narrowly – with as much restraint as possible – and solely to accomplish the goals of net neutrality[.]"); Letter from Senator Ron Wyden to Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and

B. The Commission Could Readily Conclude That Title II Regulation Is Not Necessary for the Protection of Consumers or To Advance the Public Interest

Moreover, the record already provides ample support for granting ISPs forbearance from all of Title II's obligations and restrictions under such a streamlined analysis. Section 10 of the Act provides that forbearance is *required* where the Commission determines that enforcement is "not necessary" to ensure just, reasonable, and nondiscriminatory rates or to protect consumers and is otherwise "consistent with the public interest."[95] As explained below, the Commission could grant broad forbearance from Title II in accordance with Section 10 by relying on two key considerations—the extraordinary benefits that broadband ISPs have delivered to consumers absent any Title II regulation, and the existence of Section 706 as a regulatory backstop if the Commission were to conclude that further regulation of ISPs is warranted.

The last decade-plus of experience in the U.S. broadband industry *without* the imposition of Title II offers an ideal "natural experiment" for evaluating whether Title II is "necessary" to protect competition, consumers, or the public interest—and conclusively demonstrates that it is not. In the absence of Title II, consumers have seen constant improvements in broadband performance, as top speeds have risen by a whopping 1,500 percent in the past decade,[96] spurred by more than $1 trillion in investment by broadband providers.[97] These advances in broadband speeds show no sign of abating, as an ever increasing number of broadband providers are now moving forward with plans to deploy advanced systems capable of delivering gigabit speeds.[98]

O'Rielly, GN Docket No. 14-28, at 2 (Sep. 15, 2014) ("Congress acted in the 1996 Telecommunications Act to ensure that the FCC has discretion to forbear from applying all but the few Title II provisions needed to do to the job. And there is broad consensus that the FCC would only need to apply a handful of Title II provisions in order to preserve an open Internet.").

94 *See* John Eggerton, *Eshoo: FCC Can Find Title II-Lite Solution*, Multichannel News, Sep. 10, 2014, *available at* http://www.multichannel.com/news/national-regulation/eshoo-fcc-can-find-title-ii-lite-solution/383720.

95 47 U.S.C. § 160(a).

96 *See* John Sununu and Harold Ford, Jr., *Don't Make the Internet a Public Utility*, SFGate, May 14, 2014, *available at* http://www.sfgate.com/opinion/openforum/article/Don-t-make-the-Internet-a-public-utility-5478946.php.

97 *See* USTelecom, "Broadband Investment," *available at* http://www.ustelecom.org/broadband-industry/broadband-industry-stats/investment.

98 *See* Greg Avery, *Comcast Eyes Gigabit Internet for Denver Area, Too*, Denver Business Journal, Sep. 26, 2014, *available at* http://www.bizjournals.com/denver/blog/boosters_bits/2014/09/comcast-eyes-gigabit-internet-for-denver-area-too.html?page=all (reporting that Comcast "will begin testing technology capable of 1 gig to 10 gig Internet speeds in a few months, and then offering it broadly as soon as possible"); Edmund Lee, *Cox Plans Faster Web Service in 2014 to Challenge Google*, Bloomberg, Apr. 30, 2014, *available at* http://www.bloomberg.com/news/2014-04-29/cox-plans-faster-web-service-

Meanwhile, as broadband performance continues to improve, the per-Mbps price for broadband service continues to fall, with one estimate indicating that the price that subscribers pay per Mbps has declined by at least 87 percent in recent years.[99] And as noted above, growing competition among broadband providers across the country will continue to drive these increases in broadband speeds and decreases in the per-Mbps price of broadband service for the foreseeable future.[100]

Another instructive "natural experiment" is the recent history of broadband investment and deployment in Europe, which *does* regulate broadband on a common-carrier basis, and where improvements in speed and price have been less pronounced.[101] As noted above, the level of broadband investment on a per-household basis in Europe is half that of the United States, and these diminished investments have resulted in slower deployment of high-speed broadband networks throughout Europe.[102] Thus, far from being "necessary" to protect consumers and advance the public interest, the imposition of common-carrier requirements on broadband providers likely would harm consumers and undermine the public interest.

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in-2014-to-challenge-google.html (reporting that "Cox is joining AT&T Inc. and Google Inc., which are racing to introduce fiber-optic broadband services with speeds as fast as 1 gigabit a second in cities across the U.S.").

99 *See* Comments of Comcast Corp., GN Docket No. 12-228, at 12 (filed Sep. 20, 2012).

100 As NCTA has explained at length in prior submissions, the prodigious level of investment required to deliver these benefits to consumers has been facilitated by the Commission's historical light-touch regulatory approach to broadband Internet access service. *See* NCTA Comments at 6-16. The Commission has even acknowledged that it intended to *induce* substantial investments by broadband providers in adopting and maintaining its longstanding classification of broadband Internet access as a Title I information service. *See, e.g.*, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FC Rcd 4789 ¶ 5 (2002) ("[B]roadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market."). Thus, given ISPs' significant reliance interests in the existing regulatory framework, the Commission may well be required to provide an affirmative justification for *declining* to forbear from Title II's provisions in the event of reclassification, in keeping with the Supreme Court's decision in *Fox*. *See FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009).

101 *See* Prof. Christopher S. Yoo, *U.S. vs. European Broadband Deployment: What Do the Data Say?* (Jun. 2014), *available at* https://www.law.upenn.edu/live/files/3353-us-vs-european-broadband-deployment-summary ("Yoo Study"); Roslyn Layton, *When It Comes To High-Speed Internet, The Grass Isn't Greener In Europe*, Forbes, Feb. 7, 2014, *available at* http://www.forbes.com/sites/realspin/2014/02/07/when-it-comes-to-high-speed-internet-the-grass-isnt-greener-in-europe/ ("Layton Article").

102 *See supra* at 4.

And, finally, even if the Commission were to conclude that additional broadband regulation is warranted to protect consumers and competition (beyond the open Internet rules the Commission plans to adopt in this proceeding), it would likely be able to rely on Section 706 to adopt such rules—thus rendering the affirmative obligations contained in Title II entirely unnecessary. The D.C. Circuit in *Verizon* confirmed that "[S]ection 706 of the 1996 Telecommunications Act . . . furnishes the Commission with the requisite affirmative authority to adopt [open Internet] regulations"[103]—including but not limited to rules restricting blocking, discrimination, and paid prioritization. Notably, the primary hurdle identified by the *Verizon* court to adopting such rules under Section 706—*i.e.*, that they imposed impermissible common carriage requirements on information service providers[104]—would be removed in the event of Title II reclassification. The Commission's confirmed authority under Section 706 thus provides an important regulatory backstop that obviates any need to enforce Title II's affirmative obligations and restrictions in the broadband context.

Importantly, while these considerations would support blanket forbearance from the unnecessary and burdensome obligations and restrictions contained in Title II, there would be no reason to forbear from provisions that do *not* impose such mandates. There are a small number of provisions that happen to be codified in Title II and, far from imposing unnecessary restrictions or obligations, actually facilitate the broadband investment and deployment goals that Congress set forth in Section 706 and that undergird the Commission's broadband policy. One example is Section 224, which establishes a series of rights among different classes of carriers and non-carriers with respect to access to poles, conduits, and rights-of-way.[105] Given the consistent recognition by the Commission and the courts that pole owners will seek to impose monopoly rents in the absence of rate regulation,[106] eliminating the ability to obtain access to poles at regulated rates could have devastating consequences for broadband deployment.[107] Another example is Section 230, which provides immunity from publisher-related liability for various classes of Internet intermediaries, including ISPs.[108] This immunity has nothing to do with common-carrier regulation, but eliminating it would frustrate the Internet's role as a "forum for a true diversity of political discourse, unique opportunities for cultural development, and

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103 *Verizon*, 740 F.3d at 635.

104 *Id.* at 657.

105 47 U.S.C. § 224.

106 *See, e.g.*, *American Electric Power v. FCC*, 708 F.3d 183, 185 (D.C. Cir. 2013).

107 In particular, subjecting cable broadband attachments to the telecom rate formula of Section 224(e), rather than the cable rate formula of Section 224(d), would reverse existing Commission policy—affirmed by the Supreme Court in *NCTA v. Gulf Power*, 534 U.S. 327 (2002)—and create the potential for utilities to impose unwarranted rate increases. Because such an outcome would directly undermine Section 706, the Commission should ensure that the pole-attachment provisions that are an important part of the existing regulatory framework remain in place.

108 47 U.S.C. § 230.

myriad avenues for intellectual activity."[109] Particularly if the purpose of reclassification and forbearance would be to create a regulatory environment that resembles the regime that existed before the *Verizon* decision, it would make little sense to eliminate these procompetitive provisions on which broadband providers have always relied.

III. THE COMMISSION ALSO SHOULD ENSURE THAT ITS RULES ARE APPROPRIATELY TAILORED TO THE POLICY INTERESTS AT STAKE

In addition to these important considerations regarding the broad legal framework for adopting new open Internet rules, the Commission should ensure that the rules themselves are fine-tuned to advance the relevant policy goals. While NCTA's prior submissions address the appropriate content and scope of the new rules in detail, the issues discussed below—relating to Internet traffic-exchange arrangements (*i.e.*, peering and transit agreements), specialized services, and the treatment of Wi-Fi—warrant particular attention as the Commission formulates its open Internet regulations. And as in the forbearance context, the Commission generally should approach these issues with the goal of returning to the regulatory status quo that existed prior to the *Verizon* decision.

Internet traffic exchange. First, the Commission should adhere to the NPRM's proposal to maintain the longstanding distinction between open Internet and Internet traffic-exchange issues.[110] As NCTA and others have explained,[111] the dynamic and robustly competitive Internet traffic-exchange marketplace has never been the focus of the Commission's open Internet initiatives, and should remain outside the scope of this proceeding. Internet traffic-exchange arrangements concern only "the efficient allocation of costs for the transmission of traffic across the Internet backbone," and thus "have no bearing on and are entirely distinct from any issues that are the subject of the Commission's open Internet rules."[112] Even Netflix, which has urged the Commission to address Internet traffic exchange in this proceeding, recently acknowledged that its own prioritization practices employed in connection with its Open

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109 *Id.* § 230(a)(3).

110 *See* NPRM ¶ 59 (explaining that the *2010 Open Internet Order* "noted that the rules were not intended 'to affect existing arrangements for network interconnection, including existing paid peering arrangements,'" and tentatively concluding that the Commission "should maintain this approach" in adopting any new rules) (internal citations omitted); *see also* Bryce Baschuk, *Wheeler: Peering Not a Net Neutrality Issue But FCC Spokesman Says It Will Be Watched*, Bloomberg BNA, Apr. 2, 2014, *available at* http://www.bna.com/wheeler-peering-not-n17179889335/ (quoting remarks from Chairman Wheeler explaining that "peering is not a net neutrality issue").

111 *See* NCTA Comments at 78-82; *see also, e.g.*, Comments of Time Warner Cable, Inc., GN Docket Nos. 14-28, 10-127, at 30 (filed Jul. 15, 2014); Comcast Comments at 32-39; Verizon Comments at 70-76.

112 Comcast Comments at 33.

Connect platform do not implicate open Internet issues.[113] The distinction between Internet traffic exchange and open Internet issues also is evident from the Commission's decision to undertake an entirely separate inquiry into the Internet traffic-exchange marketplace, in which it is developing a discrete record on these issues based on confidential submissions.[114] Given the highly competitive marketplace for Internet traffic exchange services, regulation of this area would be unjustified. Nevertheless, if the Commission were to conclude that further exploration of possible regulation of Internet traffic exchange is warranted, the proper path would be to issue a new notice of proposed rulemaking in connection with that separate inquiry, not to attempt to address these issues here based on a non-public record in another proceeding.

Even if it were appropriate to consider Internet traffic-exchange issues as part of this proceeding, which in our view it is not, the Commission should reject proposals to subject the Internet traffic-exchange marketplace to invasive regulation. The Commission has repeatedly declined to impose regulation of any kind on Internet traffic exchange,[115] and there is no evidence of any changed circumstances that would warrant regulation now. More specifically,

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113 *See* Letter of Christopher Libertelli, Netflix, Inc., to FCC Commissioner Ajit Pai, GN Docket No. 14-28, at 1 (filed Dec. 11, 2014) (asserting that Open Connect technology helps "better manage congestion" and denying that it implicates open Internet concerns); *see also* Letter of Commissioner Ajit Pai, FCC, to Reed Hastings, CEO, Netflix, Inc., at 1 (Dec. 2, 2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-330743A1.pdf (raising concerns that Open Connect is an effort to "secure 'fast lanes' for [Netflix's] own content . . . at the expense of its competitors"); *see also, e.g.,* Letter of Johanna Shelton, Director, Public Policy & Government Relations, Google Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 and MB Docket Nos. 12-68 and 10-91, at 1 (filed Jun. 13, 2014) (explaining that Google's peering and colocation arrangements with streaming video providers and content delivery networks such as YouTube, Netflix, and Akamai are focused on ensuring "faster delivery of higher quality video" through efficient network architectures but do not "discriminate among Internet traffic" in a manner that implicates open Internet issues)

114 *See* News Release, FCC, Statement by FCC Chairman Tom Wheeler on Broadband Consumers and Internet Congestion (Jun. 13, 2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-327634A1.pdf.

115 *See, e.g., SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290 ¶ 132 (2005) (finding that "the Internet backbone is sufficiently competitive and will remain so post-merger," and rejecting calls to impose merger conditions relating to Internet traffic exchange, noting that "interconnection between Internet backbone providers has never been subject to direct government regulation, and settlement-free peering and degradation-free transit arrangements have thrived"); *Global Crossing Ltd. and Level 3 Communications, Inc. Applications for Consent to Transfer Control*, Memorandum Opinion and Order and Declaratory Ruling, 26 FCC Rcd 14056 ¶ 27 (2011) (rejecting arguments that a combined company would have incentive to engage in anticompetitive transit and peering practices).

adopting rules that would subject all Internet traffic-exchange arrangements to a roving and undefined "test of reasonableness" or "anti-discrimination"[116]—a test that would include either a ban on or strong presumption against any arrangement that involves payment from one network provider to another[117]—would upset the important economic relationships that have always undergirded the Internet, and threaten to harm service quality and increase prices for broadband service.[118]

If, however, the Commission were to reverse course and seek to regulate the Internet traffic-exchange marketplace for the first time, it should do so evenhandedly and without singling out ISPs for special treatment. Indeed, the parties that have argued most vehemently for imposing Internet traffic-exchange regulation on ISPs have themselves been exposed as engaging in the very conduct that they claim warrants regulatory intervention. Most notably, a recent study of Internet interconnection performance resulted in the "discovery of prioritization across Cogent interconnections,"[119] and revealed that Cogent "had secretly implemented a two-tier traffic management system to ease congestion, intentionally slowing the traffic of its 'wholesale' customers—including Netflix."[120] After the study was released, Cogent was forced to admit that it "prioritized" retail Internet traffic over wholesale traffic on its network based on its retail customers' payments.[121] If the Commission determines that such "fast lanes" threaten to harm the Internet ecosystem, it would be irrational to permit self-styled transit providers (which also operate as ISPs for various edge providers) to engage in the very practices they assert to be harmful when undertaken by others. Just as the Commission has expressed concern that "pay for priority" arrangements threaten to "raise barriers to entry on the Internet,"[122]

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116 Comments of Level 3 Communications, LLC, GN Docket Nos. 14-28, at 14 (filed Jul. 15, 2014); Comments of Netflix, Inc., GN Docket Nos. 14-28, 10-127, at 18 (filed Jul. 15, 2014) ("Netflix Comments").

117 *See, e.g.*, Netflix Comments at 11 (arguing for rules limiting "pay-for-play" at "points of interconnection").

118 *See* NCTA Reply Comments at 33 (explaining that "the longstanding practice in the Internet traffic-exchange marketplace of seeking payment when costs or traffic flows are out of balance creates a powerful incentive for content providers and their backbone partners to rely on efficient delivery methods," and that mandating settlement-free connections could lead to a significant *increase* in Internet congestion and shift traffic-exchange costs to end users).

119 *See* Letter of Open Technology Institute and M-Lab to Marlene Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 2 (filed Nov. 18, 2014) (also attaching M-Lab study).

120 *See* Letter of Larry Downes, Georgetown University, McDonough School of Business, to Marlene Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, 09-191, at 4 (filed Dec. 5, 2014) (citing data and findings recently made public by M-Lab).

121 *See* Hank Kilmer, Cogent, "M-Labs data and Cogent DSCP markings," *available at* https://groups.google.com/a/measurementlab.net/forum/#!topic/discuss/vcQnaZJO6nQ.

122 *2010 Open Internet Order* ¶ 76.

Cogent's prioritization could have exactly the same impact. Accordingly, it would be arbitrary and capricious to regulate the Internet traffic-exchange practices of ISPs while exempting other marketplace participants from such rules.

Specialized services. The Commission also should adopt the tentative conclusion in the NPRM that "specialized services" should remain outside the scope of any new rules.[123] The Commission recognized in the *2010 Open Internet Order* that, while broadband providers offer services that "share capacity with broadband Internet access service over providers' last-mile facilities,"[124] those services should not be regulated as broadband Internet access services.[125] As the Commission explained, these "specialized services . . . supplement[] the benefits of the open Internet,"[126] and help "drive additional private investment" in deploying and upgrading broadband networks"[127]—findings that have been corroborated by recent reports from Commission's Open Internet Advisory Committee.[128] There is no basis to depart from this restrained approach towards specialized services and risk undermining investment incentives and the valuable benefits these services could provide.

Wi-Fi. Finally, the Commission should carefully consider the specific characteristics of unlicensed Wi-Fi to the extent it applies open Internet rules to such services. Like licensed mobile broadband networks, unlicensed Wi-Fi networks face spectrum constraints and congestion issues that can pose particular network-management challenges.[129] But unlike licensed spectrum, providers of Wi-Fi service must accept and manage interference from other users in the unlicensed bands. Accordingly, to the extent that the Commission applies open Internet rules to unlicensed Wi-Fi providers, it should, at the very least, provide significant flexibility in applying any "reasonable network management" standard to Wi-Fi that recognizes its specific capacity and congestion constraints.

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123 NPRM ¶ 60.

124 *2010 Open Internet Order* ¶ 112.

125 *Id.*

126 *Id.*

127 *Id.*

128 *See* Open Internet Advisory Committee, 2013 Annual Report, at 67 (Aug. 20, 2013).

129 *See Revision of Part 15 of the Commission's Rules To Permit Unlicensed National Information Infrastructure (U-NII) Devices in the 5 GHz Band*, First Report and Order, 29 FCC Rcd 4127 ¶ 9 (2014) (noting the growing problem of "congestion" on Wi-Fi networks); *see also* Rob Alderfer, *Wi-Fi Spectrum: Exhaust Looms*, CableLabs, at 4 (May 2013) (finding that the 2.4 GHz band, which continues to be the primary band used for Wi-Fi, faces the prospect of "exhaustion" in the near term).

Please contact the undersigned if you have any questions regarding these issues.

Sincerely,

/s/ Matthew A. Brill
Matthew A. Brill
Counsel for the National Cable & Telecommunications Association